IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 98-41048**
BARDELL ANDERTON,	)	
	)	
Debtor.	)	
_____	)	
	)	
BARDELL ANDERTON,	)	**Adv. No. 99-6022**
	)	
Plaintiff,	)	**MEMORANDUM OF DECISION**
	)	
vs.	)	
	)	
UNION PLANTERS MORTGAGE and Does 1-20,	)	
	)	
Defendants.	)	
_____	)	

Bardell Anderton, Pocatello, Idaho, Pro Se Plaintiff.

Ford Elsaesser, Sandpoint, Idaho, for Defendant.

Before the Court for disposition is a motion by Defendant Union Planters Mortgage under Rule 60(b) of the Federal Rules of Civil Procedure for relief from a default judgment entered in favor of the Plaintiff, a Chapter 11 debtor, on June 17, 1999. Also considered herein is Plaintiff's Motion to Impose Sanctions against Defendant filed on November 29, 1999. After a careful review

of the record, the Court, in the exercise of its discretion, concludes both motions should be denied. This Memorandum constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

Background

A review of the circumstances surrounding this litigation is necessary to understanding the basis for the Court's decision. From the record developed in this action, the following are presumed to be the facts.

In October 1992, Plaintiff and his late wife purchased a house in Blaine County. As part of the transaction, Plaintiff agreed to pay the remaining balance due on the mortgage on the property held by Homestead Savings. Plaintiff inquired about assuming the mortgage and was told by the lender's representatives that in order to transfer the loan to his name, he must provide certain information and send a $25 assumption fee to the lender. This was done, however Plaintiff never received confirmation by Homestead that the loan assumption was complete. Instead, Plaintiff later learned that at some point in time prior to August of 1994, the loan had been transferred by Homestead to another institution, J.I. Kislak Mortgage Corporation ("Kislak").

Kislak initially refused Plaintiff's monthly payments on the loan. When he inquired about this development and advised Kislak of his status regarding the property and loan, Plaintiff was told to submit a $45 transfer fee and other documents in order to properly transfer the mortgage to him. Plaintiff once again complied and asked for an accounting of the payments he had made on the loan. Once again, and without receiving the accounting from Kislak, Plaintiff started receiving correspondence and documents from yet another lender, Leader Federal Bank ("Leader"). The mortgage had once again changed hands on the secondary market in February 1995. While Leader also required Plaintiff to pay a $50 transfer fee, the loan was finally placed in his name. Plaintiff continued making payments on the loan. In late 1996, it appears Defendant Union Planters Bank acquired the mortgage from Leader as part of a purchase of its entire portfolio of accounts from the Resolution Trust Corp., since Leader had apparently failed.

As Plaintiff struggled to take responsibility for and to pay the mortgage loan, on two separate occasions Plaintiff received notification from Defendant that a foreclosure was being instituted despite his being current in the payments. Frustrated with the poor treatment he had received from the various mortgagees, in early 1998 Plaintiff stopped making payments on the mortgage.

Plaintiff's inability to get information or cooperation from the lenders, including Defendant, caused Plaintiff several problems. Plaintiff attempted to sell the property on several occasions. In 1996, a sale was thwarted when Plaintiff could not obtain information from the mortgagee concerning the terms and status of the loan. Plaintiff also attempted to refinance the loan in 1997 to obtain a lower interest rate. However, because Plaintiff could not obtain any information from the mortgagee, he was unable to do so.

On September 1, 1998, Plaintiff filed a *pro se* Chapter 11 petition. Out of frustration and anger over the situation concerning the mortgage, Plaintiff filed this adversary proceeding against Defendant on February 11, 1999. His complaint stated claims against Defendant for breach of contract, bad faith, and for violation of the automatic stay based on alleged conduct of Defendant in handling his mortgage.

Service of process was made on Defendant initially on February 11, 1999 when one of Plaintiff's employees sent a copy of the complaint and summons to Defendant by certified mail[1] addressed simply to "Union Planters Mortgage" at a Memphis, Tennessee post office box. The process was received

[1] The certificate of service on the back of the original summons indicates service was made by first-class mail. However, an original certified mail receipt is stapled to the certificate.

by Defendant on February 16, with “James Taylor” signing the mail receipt on Defendant’s behalf. No answer or motion was filed by Defendant in response to the complaint. On March 18, Plaintiff applied for entry of default. When presented with the file, the Court was concerned that service had not been properly effected. The Court asked the Clerk to recommend that Defendant consider as an alternative approach personal service on the Defendant.

Per the Clerk’s suggestion, on March 24, 1999, Plaintiff had a deputy sheriff for Shelby County (Memphis), Tennessee personally serve a copy of the summons and complaint on Defendant by delivering the documents to Rose Ann Jackson, a “legal services” employee for Defendant, at Defendant’s offices. Again, when no timely response to the complaint was forthcoming from Defendant, Plaintiff requested entry of default. Clerk’s default was entered on May 4. On May 15, Plaintiff filed a motion for entry of default judgment. This Court conducted an evidentiary hearing on the motion on June 17. The file indicates a copy of Plaintiff’s motion and notice of the hearing on the motion was mailed to Defendant. Defendant failed to appear. After considering the evidence and testimony submitted by Plaintiff at the hearing and otherwise appearing in the file, the Court granted Plaintiff’s motion, and determined that Plaintiff should recover a default judgment against Defendant for damages equal

to the outstanding balance due on the mortgage.[2] In other words, the judgment declared that the mortgage had been satisfied in full. The written judgment was formally entered on June 17, 1999, and a copy was mailed to Defendant.

After the entry of judgment, Plaintiff received an offer from a third party to buy the Blaine County house. Considering his circumstances, and in light of the Court's judgment declaring Defendant's mortgage satisfied, Plaintiff proposed to the Court and his creditors that the house be sold, other encumbrances on the house be paid in full, and that the remaining funds be used to pay his unsecured creditors, upon conclusion of which he would dismiss his Chapter 11 case. Plaintiff filed a motion for approval of his sale and distribution proposal on September 17, 1999. Notice was given to all interested parties in the bankruptcy case, including Defendant, and on September 23, the Court conducted a hearing on the motion. No objection to the motion to sell Plaintiff's house was filed. The Court approved sale of the house and distribution of the proceeds in an order entered the same day, and in an amended order was entered on September 24.

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[2] While he had requested a statement of balance due on the mortgage, Plaintiff had never received one, and so he could only estimate for the Court what he believed in good faith to have been the remaining balance due on the mortgage. However, under the circumstances, the remedy reflected in the Court's judgment was not dependent upon the precise amount due.

In the meantime, on September 15, 1999, Defendant filed the present motion to set aside the default judgment, accompanied by a short, conclusory affidavit by a "staff attorney" for Defendant. The Court conducted a hearing on the motion on October 21. Plaintiff appeared and objected strenuously to the motion. After consideration of the motion and affidavit, the Court declined to grant relief based upon the affidavit and sketchy showing made by Defendant, and instead offered Defendant an opportunity to present live testimony in support of the motion at a later date. A continued hearing was held on November 30, 1999. Plaintiff filed his Motion to Impose Sanctions against Defendant on November 29, and that motion was also considered at the November 30 hearing.

At that evidentiary hearing, the Court heard the testimony of two witnesses offered by Defendant. One was Ms. Jackson. She testified that at the time of service she was an employee, but not an officer, of Defendant. As part of her duties, she has been designated by Defendant's management to physically receive all legal process served by the sheriff on Defendant, and to forward such legal paperwork to the appropriate officers for handling. While she could not recall specifically receiving the summons and complaint in this matter, she does not deny she did get the documents as reflected in the sheriff's return of service.

She indicates that she would have forwarded the documents to her supervisor for appropriate action, who would in turn forward the papers to legal counsel, if necessary. Ms. Jackson had no knowledge of why, under the circumstances, Defendant could not have filed a timely response to the complaint.

The Court also heard the testimony of Jarrel David Weatherford, an officer of Defendant. He sponsored into evidence written records reflecting the status of Plaintiff's loan. He also explained the circumstances surrounding Defendant's acquisition of Leader's loan portfolio, and outlined Defendant's administrative difficulties in servicing what was, at least to Defendant, a large number of loans.[3] Mr. Weatherford knew nothing about Defendant's handling of the summons and complaint or why Defendant did not timely respond to Plaintiff's action in this case.

During the hearing, Defendant's attorney represented to the Court that in his investigation of the circumstances of this action, two copies of the summons and complaint had been located in the files of Defendant's retained counsel. The record does not show when or under what circumstances the papers had been given to retained counsel. While he could attest to the

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[3] Plaintiff also testified at the hearing outlining his bad experiences with the various lenders and complaining about the adverse consequences he would suffer if the default judgment were set aside. Plaintiff argued that his motion for sanctions should be granted under these circumstances.

presence of the pleadings in the law firm's files, counsel could offer the Court no explanation why a timely response to Plaintiff's complaint had not been made.

The issues raised by the motions were taken under advisement.

Discussion

I. The Rule 60(b) Motion

Defendant's motion for relief from the default judgment is based upon two different provisions of Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b). Rule 60(b) allows this Court to grant relief from a final judgment for excusable neglect, Fed. R. Civ. P. 60(b)(1), or for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Whether relief should be granted under Rule 60(b) is a matter addressed to the sound discretion of the trial court. *Zimmerman v. First Fidelity Bank (In re Silva),* 97.4 I.B.C.R. 118, 119, aff'd 185 F.3d 992 (9th Cir. 1999) (citing *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1468 (9th Cir. 1995)).

Rule 60(b) is remedial in nature and should be liberally applied. *Gregorian v. Izvestia*, 871 F.2d 1515, 1523 (9th Cir. 1989). The Court must

address three factors in determining whether it will set aside a default judgment under Rule 60(b): (1) whether the judgment was entered as a result of the defendant's culpable conduct; (2) whether the defendant has shown a meritorious defense; and (3) whether the plaintiff would be prejudiced if the judgment is set aside. *Hammer v. Drago (In re Hammer)*, 940 F.2d 524, 525-26 (9th Cir. 1991); *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987). This three-part test is disjunctive. *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988). Thus, "a finding that the plaintiff will be prejudiced, or that the defendant lacks a meritorious defense, or that the defendant's own culpable conduct prompted the default is sufficient to justify the district court's refusal to vacate a default judgment." *Id.* at 1415.

A. Rule 60(b)(1)

Defendant first argues the judgment should be set aside under Rule 60(b)(1) because it was entered as a result of Defendant's "excusable neglect." In particular, Defendant alleges: (1) it did not receive proper notice of Plaintiff's action under Rule 7004 of the Federal Rules of Bankruptcy Procedure; (2) internal confusion concerning the Leader loans in general, and Anderton's account in particular, contributed to the problems surrounding this case; and (3) Defendant believed the law firm it had retained to handle the foreclosure matters

would also handle other bankruptcy related issues, including this adversary proceeding.

The Ninth Circuit has held the Supreme Court's analysis in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), dealing with the concept of excusable neglect under Rule 6(b) of the Federal Rules of Civil Procedure, also governs disposition of a motion under Rule 60(b). *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). In *Pioneer*, the Supreme Court reasoned that:

> [because] Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395.

1. Notice

While not arguing that service was, as a matter of law, inadequate, Defendant suggests that it should be excused from failing to timely respond to Plaintiff's complaint because Rule 7004(h) of the Federal Rules of Bankruptcy Procedure was not observed in this case. That Rule establishes the procedure for serving process by mail on a federally insured bank and provides:

> Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless–
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Fed. R. Bankr. P. 7004(h). Obviously, the Rule helps assure that when a law suit is brought against a lending institution, the process is placed in the hands of a responsible officer so the defendant can take appropriate action. However, as an alternative to service by mail on lenders, Rule 7004(a) also authorizes personal service of process upon a defendant in adversary proceeding in the manner prescribed by Fed. R. Civ. P. 4 (e) - (j). In turn, Rule 4(h)(1) directs

personal service on a corporation by delivery of a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment of the defendant. After review of the facts of this case, it is clear the purpose of these Rules was satisfied by the means used to effect service by the Plaintiff.

Plaintiff first served his complaint and summons on Defendant by certified mail, although the correspondence was not addressed to any particular officer. It now appears, or at least Defendant does not dispute, that Defendant actually received the summons and complaint as evidenced by the mailing receipt, and that Defendant handled those materials through its usual channels, with copies ending up in its attorneys' file. It is therefore difficult to accept Defendant's plea that it was somehow prejudiced in some manner by the method of service under these facts.

In addition, Defendant received the benefit of the Court's concerns about whether Defendant had been given fair notice of Plaintiff's action. The Court recommended, and Plaintiff also effected, personal service on Defendant. A second copy of the complaint and summons was hand-delivered by a deputy sheriff to Ms. Jackson at Defendant's office in Memphis. While Ms. Jackson was not an officer of Defendant at the time she accepted service, her testimony

shows she had been designated by Defendant's management to receive legal process for Defendant. Moreover, Ms. Jackson testified that Plaintiff's complaint and summons were handed up the line to Defendant's management. Again, based upon the representations of Defendant's counsel at the hearing, it appears Defendant passed the process along to its attorneys.

Under the circumstances, the Court is convinced that any technical shortcomings of Plaintiff's efforts at service of process did not materially contribute to Defendant's failure to file a timely answer. Defendant concedes it actually received the summons and complaint (two sets) and passed the information on to its attorneys. The papers were hand-delivered to Defendant's designated employee responsible for handling legal process, and she forwarded them to her supervisor, who in turn presumably sent the materials to Defendant's lawyers. Defendant does not show how personal service on one of its officers would have led to a timely response to the complaint. Because the test for excusable neglect is an equitable one, Defendant should be estopped by its own actions from asserting that the means of service utilized here contributed in any way to its failure to take appropriate action. The Court concludes Defendant has not established grounds under Rule 60(b)(1) sufficient to set aside the default judgment.

2. Internal Confusion

Defendant next asserts that internal administrative confusion following Defendant's acquisition of Leader's loan portfolio amounts to excusable neglect. Of course, even if internal administrative confusion justified Defendant's indifference to Plaintiff's requests for information and servicing on his loan, trouble in dealing with the new loan portfolio is not an excuse for not responding to the summons and complaint.

Moreover, in a slightly different context, the Ninth Circuit Court of Appeals rejected a similar argument. In *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc*., 21 F.3d 952 (9th Cir. 1994). In *Familian Northwest*, the successful litigant, Familian, sought relief from judgment under Rule 60(b)(1) in order to enhance the amount of its judgment based upon several invoices that had been overlooked at trial. Familian argued its corporate restructuring had caused the oversight, and such amounted to excusable neglect. However, the Ninth Circuit affirmed the district court's exercise of discretion in denying Familian's Rule 60(b) motion stating that it was "unpersuaded to excuse Familian's oversight due to its own restructuring." *Id.* at 956; *see also Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 398 (1993) (giving little weight to attorney's

contention that upheaval in his law practice constituted excusable neglect). Thus, Defendant's internal confusion following its acquisition of the Leader accounts does not amount to excusable neglect under Rule 60(b)(1).

3. Fault of Counsel

Finally, Defendant asserts it believed its attorneys, Shapiro & Meinhold, would defend the adversary proceeding. One obvious problem with this argument is that it is not supported by the testimony of Defendant's witnesses at the hearing or any other competent evidence produced in these proceedings. In fact, it is sheer speculation that it was the lawyers, and not Defendant's own management, who "dropped the ball." While Defendant's attorney represented at the hearing that copies of the summons and complaint were found in the law firm's files, neither of the witnesses testified to any personal knowledge as to the circumstances under which the papers were given to the retained counsel. The Court is unwilling to simply assume that since the lawyers received copies of the summons and complaint that Defendant's management could, in good faith, assume the lawyers were going to timely respond to the suit.

In addition, Defendant's excuse suffers from a lack of originality. It could conceivably be invoked by every corporate defendant whose lawyer fails

to defend an adversary proceeding. Generally, a party is bound by the acts or omissions of its lawyer. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Jones Stevedoring Co. v. Director, Office of Workers Compensation Programs*, 133 F.3d 683, 689 (9th Cir. 1997). The Ninth Circuit instructs that "[n]either ignorance nor carelessness on the part of the litigant *or his attorney* provide grounds for relief under Rule 60(b)(1)." *Engleson v. Burlington Northern Railroad Company*, 972 F.2d 1038, 1043 (9th Cir. 1992) (emphasis added). Even if the record showed that it was the law firm, and not Defendant, who failed in this process, without more, this excuse rings hollow. No reason to stray from the general rule is found here.

B. Rule 60(b)(6)

Defendant also seeks relief under Rule 60(b)(6), which allows a court to relieve a party from judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). While the Rule does not particularize reasons that may justify relief, the United States Supreme Court has given courts "authority adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice, while also cautioning that it should only be applied in 'extraordinary circumstances'." *Liljeberg v.*

Health Services Acquisition Corp., 486 U.S. 847, 863 (1988)(citing *Klapprott v. United States*, 335 U.S. 601, 614-15, (1949); and *Ackermann v. United States*, 340 U.S. 193 (1950)).

A detailed examination of the reasons offered by Defendant for relief under subsection (b)(6) is unnecessary here since "[i]t has been established in this Circuit that clause (6) and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be for some reason other than the five reasons preceding it under the rule." *Molloy v. Wilson*, 878 F.2d 313, 316 (9th Cir. 1989)(citing *LaFarge Conseils et Etudes, S.A. v, Kaiser Cement & Gypsum Corp*., 791 F.2d 1334, 1338 (9th Cir. 1986)); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988)(reason for relief under Rule 60(b)(6) must not be premised on one of the grounds enumerated in clauses (b)(1) through (b)(5)). The only reason advanced by Defendant to justify relief under Rule 60(b)(6) is insufficient notice under Rule 7004(h). This argument has already been addressed under Rule 60(b)(1) for excusable neglect. Rule 60(b)(6) is only to be applied in rare cases where a party was prevented by "extraordinary circumstances" from seeking timely prevention or correction of an erroneous judgment. *United States v. State of Washington*, 98

F.3d 1159, 1163 (9th Cir. 1996). This is not such a case. For this reason, Rule 60(b)(6) cannot be used by Defendant to set aside Plaintiff's judgment.

C. General Considerations

Having disposed of Defendant's specific arguments, the Court also concludes that Defendant has not shown it can satisfy the general requirements for relief from a judgment under Rule 60(b) discussed above.

First, in its analysis of Defendant's motion, the Court presumes that, if granted the opportunity, Defendant could offer a meritorious defense to Plaintiff's claims. From the testimony at the hearing and the Court's file, it would appear that some, but not all, of the offensive conduct to which Plaintiff was subjected in attempting to deal with the mortgage on his property originated with Defendant's predecessors in interest. That being the case, the Court may be inclined to reconsider the remedy granted Plaintiff in the final judgment, i.e., declaring the mortgage satisfied in full. However, as the case law makes clear, this showing by itself is not enough to support relief from the judgment.

Defendant's conduct in this case is clearly culpable. *See Hammer v. Drago (In re Hammer),* 940 F.2d 524, 525-526 (9th Cir. 1991). As a sophisticated lending institution with employees devoted to responding to legal process, and with retained counsel to defend its interests, any problems

experienced in timely responding to Plaintiff's complaint were of its own creation.

In addition, Defendant's lack of an appropriate response was prejudicial to Plaintiff and potentially other creditors in this bankruptcy case. Plaintiff offered and sold the Blaine County property in reliance on the Court's judgment, and on Defendant's failure to participate in this action or object to the sale of the property in the Chapter 11 case. Plaintiff has committed the proceeds of that sale to other obligations, and has bound himself, upon completion of distributions, to dismiss the Chapter 11 case. The Court can only speculate as to what Plaintiff's course of action may have been had this litigation resulted in a ruling that Defendant's mortgage was a valid claim. Defendant's cavalier approach to the litigation has put Plaintiff, a small businessman, to considerable inconvenience and stress in defending his interests.

All things considered, since this is an issue of equity, clearly the equities do not favor Defendant. The Court concludes Defendant's conduct was culpable and any neglect by Defendant cannot be excused. Defendant had notice of the adversary action and simply failed to respond until default judgment had been entered by the Court. Defendant received two formal invitations to respond to the complaint and ignored both. Plaintiff relied upon Defendant's failure to act in deciding to sell his property and restructuring his indebtedness.

Even assuming Defendant had a meritorious defense to the action, there is ample cause to deny Defendant's motion, and so by separate order the Court will do so.

II. The Sanctions Motion

Plaintiff argues he is entitled to sanctions against Defendant because, in essence, Defendant should have known its Rule 60(b) motion lacked merit. Plaintiff cites no legal authority for his motion, and so the Court assumes his request is based on Fed. R. Bankr. P. 9011(b) . The basis for Plaintiff's argument, especially in light of the Court's analysis of Defendant's motion above, seems somewhat credible. However, the Court declines to award sanctions under these circumstances.

Whether to award sanctions under the Rule is a matter submitted to the Court's discretion. *Hudson v. Moore Business Forms, Inc*., 836 F.2d 1156, 1163 (9th Cir.1987). In this case, Defendant has already suffered a significant penalty in not responding to Plaintiff's complaint when the Court declared Defendant's mortgage satisfied. While its seems Plaintiff has been mistreated by Defendant, Mr. Weatherford formally apologized to Plaintiff while testifying, a gesture the Court accepts as sincere.

In addition, Plaintiff has not shown that he has complied with the procedural conditions of Rule 9011(c). Even if grounds existed, this failure precludes an award of sanctions under the Rule. Therefore, Plaintiff's motion will be denied.

Conclusion

For the reasons discussed above, Defendant's motion for relief from the default judgment and Plaintiff's motion to impose sanctions against Defendant will both be denied by separate order.

DATED This 11th day of January, 2000.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
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ADV. NO.: 99-6022

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk